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Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-Discrimination Rights and Religious Free Exercise Rights in the Public Workplace

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Caught Between the Scylla and Charybdis:[1] Ameliorating the Collision Course of Sexual Orientation Anti-discrimination Rights and Religious Free Exercise Rights in the Public Workplace*

I. INTRODUCTION

In recent decades, religious individuals and institutions have increasingly brought actions against the application of civil rights laws, particularly those laws that prohibit discrimination based on sexual orientation.[2] Correspondingly, and perhaps reciprocally, advocates for the prohibition of discrimination based on sexual orientation have increasingly become less tolerant of religious belief, particularly in the workplace.[3] Recently,

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1. According to Greek mythology, epic mariners Jason and Odysseus successfully navigated the narrow strait between two equally imposing forces: Scylla, the six-headed and twelve-legged monster that would roll rocks upon passing ships and devour crew members; and Charybdis, the terrible whirlpool monster that gulped down large portions of the surrounding sea, devouring ships and striking fear into these vessels' sailors. *See generally* THE LIBRARY OF GREEK MYTHOLOGY BY APOLLODORUS (BOOK I) 25 (Keith Aldrich trans., Coronado Press 1975). *See also* Hugo Van Der Molen, *The Voyage of the Argonauts*, *at* http://home-1.tiscali.nl/~molen/scripophily/texts/USA,Argonaut.html (last modified Dec. 28, 2001); *Greek Mythology: Odysseus*, *at* http://members.aol.com/GoddessCal/odym.html (last visited Nov. 26, 2001).

2. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that the government had a sufficiently compelling interest in eradicating racial discrimination where the Internal Revenue Service denied tax-exempt status to this non-profit, private, religious institution that prescribed racially discriminatory admissions standards); EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1275 (9th Cir. 1982) (reviewing a case in which a religious publishing house, claiming belief in a religious doctrine that prohibited church members from bringing lawsuits against the church, dismissed employees in retaliation for filing discrimination claims); Voluntary Ass'n of Religious Leaders, Churches, & Orgs. v. Waihee, 800 F. Supp. 882, 883 (D. Haw. 1992) (dismissing challenge to state statute prohibiting sexual orientation discrimination in employment); Madsen v. Erwin, 481 N.E.2d 1160, 1161, 1166 (Mass. 1985) (determining that a state law prohibiting sexual orientation discrimination in employment unnecessarily burdened a church-published newspaper's free exercise right); State *ex rel.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 846, 847 n.4 (Minn. 1985) (stating that health club owners who insisted on only hiring employees whose religious beliefs were consistent with their religious beliefs were required to comply with the state law prohibiting discrimination on the basis of sex, religion, and marital status).

3. *See generally* Bruff v. N. Miss. Health Serv., Inc., 244 F.3d 495 (5th Cir. 2001) (holding that the state medical facility is not required to reasonably accommodate a state employee's religious aversion to counseling homosexual clients because to hold otherwise would pose an undue burden upon the state employer); Altman v. Minn. Dep't of Corrs., 251 F.3d 1199 (8th Cir. 2001) (holding that the Minnesota Department of Corrections violated its employees' First Amendment right to free speech rather than free exercise when those employees suffered adverse employment action for bringing their Bibles to a gay sensitivity training seminar); Philips v. Collings, 256 F.3d 843 (8th

public employers have found it increasingly difficult to navigate through these clashing phenomena, and now with the advent of state-endorsed gay[4] rights sensitivity training, public employers are caught in a culture war with both sides—religious advocates and gay advocates—engulfing employers with their respective claims of superior rights.

Because, historically, freedom of religion was the first right entrenched within our jurisprudential framework, and because gay anti-discrimination rights are among the newest or latest rights, this Comment primarily focuses on how gay rights (or the "weaker" of these two clashing rights) may, without mandating acceptance by those who are morally opposed to the gay lifestyle, gain greater social and legal recognition. Although on their face sexual orientation rights and religious rights appear remarkably opposed to one another, they are in reality quite similar in a significant number of ways; and therefore, they should be similarly treated.

This Comment recognizes that comparing religion and sexual orientation may, at first glance, shock the reader and that readers with either a zealous, gay advocacy agenda, or, conversely, readers with a fundamental religious bent will reject this comparison outright. However, the majority that exists between these two polar views may benefit from a policy framework that recognizes that the state must remain as neutral as possible in such a culture clash. Polls reveal that a solid majority of Americans would support gay anti-discrimination legislation.[5] Americans also fear, however, that the state is prepared to endorse or already has endorsed a permissive sexual orientation value system.[6] Vermont's Senator James M. Jeffords aptly aligned these two, somewhat conflicting sentiments when he declared that "[p]eople don't want to go too far on changing marriage and traditional relationships . . . . But the feeling is when someone wants to work someplace, they ought to be able to get a job."[7]

Cir. 2001) (holding that a Missouri Department of Social Services supervisor violated her employee's § 1983 civil rights where, upon learning of that employee's religious views on homosexuality, that supervisor took adverse employment action); Hyman v. Louisville, 132 F. Supp. 2d 528 (W.D. Ky. 2001) (holding that the city of Louisville's sexual orientation anti-discrimination statute does not violate, on free exercise grounds, a private employer's desire to refuse employment to homosexuals).

4. For the purposes of this Comment, "gay" is an inclusive term referring to not only male homosexuals, but also to lesbian, bisexual, and transgendered persons.

5. *See Human Rights Campaign: Working for Lesbian, Gay, Bisexual and Transgender Equal Rights*, *at* http://www.hrc.org/issues/federal_leg/enda/background/index.asp (last visited Dec. 3, 2001).

6. *See infra* Part III.

7. Eric Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, N.Y. TIMES, Sept. 11, 1996, at A1.

Part II of this Comment provides a basic understanding of free exercise jurisprudence and also describes the current state of sexual orientation discrimination law. Part II also goes beyond the law and attempts to provide a snapshot of contemporary American society's take on religious and gay rights. Part III chronicles the advent of gay sensitivity training into the workplace. This section, by explicating the Eighth Circuit's *Altman v. Minnesota Department of Corrections*[8] case, also highlights how this educational movement provokes a culture clash of values, particularly in the public workplace. As mentioned above, because rights based upon sexual orientation is the relatively new player in respect to constitutionally enshrined religious rights, Part IV focuses on the misguided constitutional tact upon which many gay rights advocates have exerted much energy. Specifically, Part IV asserts that attempting to elevate sexual orientation discrimination directly into the U.S. Constitution through the path of equal protection is, legally and socially, the wrong approach. Part V introduces a proposal. Because gay rights advocates desire more than just *legal* equality in society, Part V prescribes a path by which gay rights advocates may achieve such equality without infringing upon others' rights. Specifically, Part V advocates (1) that, in light of major American social movements, particularly the American civil rights movement, gay rights advocates should look to religion rather than spurn religion in their quest for equality; (2) that legislative means rather than judicial means should be used to gain the ultimate end of equality; and (3) that, because religion and sexual orientation are substantially similar in significant ways, legislative enactments should be "principly" based upon the First Amendment's religion clauses. Such a principled legislative framework is better than simply passing anti-discrimination legislation based on sexual orientation because it not only provides that sexual orientation, like religion, should be relegated to the private sphere where most Americans feel it properly belongs but also because it assures other factions (particularly religious factions within our heavily pluralistic society) that the state will not endorse or promote either the rejection or acceptance of gay rights. In short, the state will remain neutral; or, in other words, the state will not affirmatively promote or endorse gay sensitivity programs in a public setting any more than it cannot promote religious sensitivity. Part VI offers a brief conclusion.

8. 251 F.3d 1199 (8th Cir. 2001).

II. BACKGROUND

A. The First Amendment's Free Exercise Clause

The First and Fourteenth Amendments mandate that the state "shall make no law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof . . . ."[9] Because the Constitution restrains government action, these First Amendment protections are "most pertinent to religious disputes that occur within public-sector workplaces."[10] The free exercise clause, on its face, bars the government from infringing upon a person's right to hold private religious beliefs.[11]

The free exercise clause also bars the government from infringing upon a person's right to engage in religiously motivated conduct[12] unless the government can show a compelling interest why it should do so.[13] Therefore, the government, in its role as employer, may infringe upon constitutionally protected religious conduct in two notable circumstances. First, a government employer may prohibit or limit religious conduct that hinders the performance of that public employer's mission. Second, due to the establishment clause, government agencies should not permit their employees to engage in religious conduct when that conduct may reasonably convey the impression to the public that the government is supporting or endorsing religion or religious practices.[14]

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9. U.S. CONST. amend. I (emphasis added). The first clause is referred to as the establishment clause; the second clause is referred to as the free exercise clause. Under the incorporation principles of the Fourteenth Amendment, both of these clauses are applicable to the several states. *See* Cantwell v. Conn., 310 U.S. 296 (1940).

10. MICHAEL WOLF ET AL., RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES 5 (1998) (footnote omitted). Although private sector employers generally have more leeway than public sector employers to squelch their employees' First Amendment religious rights, Title VII of the Civil Rights Act of 1964 does provide employees some religious protection in the private sector. *See, e.g.*, 42 U.S.C. §§ 2000e (1994).

11. *See* Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488 (1990).

12. *See id.*

13. *See* 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 106–107 (3d ed. 1999). From its 1963 decision of *Sherbert v. Verner*, the Supreme Court applied a heightened level of scrutiny even when analyzing the government's incidental imposition of burdens upon religious conduct. In 1990, however, the Supreme Court returned to its pre-*Sherbert* position in *Employment Division, Department of Human Resources v. Smith*, by holding that unless the free exercise clause is invoked in conjunction with other constitutional protections (hybrid rights), the government need not assert a compelling interest as justification of its actions if religion is only incidentally affected by a neutral, generally applicable law. Only when the objective of a law is to regulate religion and if that regulation places a substantial burden upon religious conduct should the compelling interest test apply. *See* WOLFE, *supra* note 10, at 145–47. *See also* City of Boerne v. Flores, 521 U.S. 507 (1997); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990); Sherbert v. Verner, 374 U.S. 398 (1963).

14. *See* WOLFE, *supra* note 10, at 6. Government agencies need not permit such conduct be-

B. Sexual Orientation Discrimination Jurisprudence

1. Federal law

Although federal law provides basic legal protection against public *and* private employment discrimination on the basis of race, gender, religion, national origin, or disability, there is neither a constitutional provision nor a federal statute "that explicitly bars discrimination on the basis of sexual orientation."[15]

With the Employment Non-Discrimination Act ("ENDA"), Congress, throughout the 1990s, has introduced and debated passage of a statutory scheme to protect against sexual orientation discrimination in the workplace.[16] This legislation, however, has consistently failed to pass.[17] Currently, EDNA's reintroduction is scheduled before the 107th Congress on July 31, 2002.[18] It should be noted, however, that pursuant to a recent executive order, employers within the federal public sector may not discriminate upon the basis of sexual orientation.[19]

2. State and local law

Most civil rights legislation designed to protect against sexual orientation discrimination has taken root at the state and local levels of government.[20] Currently, twelve states and the District of Columbia prohibit such workplace discrimination.[21] Covering discrimination not only in

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cause the government would then breach the principle of religious neutrality at the heart of the establishment clause. *See id.*

15. Thomas H. Barnard & Timothy J. Downing, *Emerging Law on Sexual Orientation and Employment*, 29 U. MEM. L. REV. 555, 557 (1999).

16. *See id.* at 557.

17. "ENDA was introduced in the 103d Congress in 1994 in House Bill 4636. H.R. 4636, 103d Cong. (1994). The Bill was reintroduced in the 104th Congress in 1995 in House Bill 1863. H.R. 1863, 104th Cong. (1995). It also was reintroduced in the first session of the 105th Congress in 1997 in both the House and the Senate. See H.R. 1858, 105th Cong. (1997); S. 869, 105th Cong. (1997)." Barnard & Downing, *supra* note 15, at 565 n.50. With bipartisan support, the Bill was introduced and failed before the 106th Congress. See H.R. 2355, 106th Cong. (1999); S. 106, 106th Cong. (1999). *Id.* at 565 n.51.

18. *See* H.R. 2692, 107th Cong. (2002); S. 1284, 107th Cong. (2002). *See also Human Rights Campaign: Working for Lesbian, Gay, Bisexual and Transgender Equal Rights*, *at* http://www.hrc.org/issues/federal_leg/enda/index.asp (last visited Dec. 3, 2001).

19. *See* Barnard & Downing, *supra* note 15, at 557.

20. States, of course, have power to enact such legislation under their reserved, Tenth Amendment police powers. *See, e.g.*, David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption From Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1183 (1994). The Tenth Amendment provides, in pertinent part, that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." *See* U.S. CONST. amend. X.

21. These include California, Connecticut, Hawaii, Massachusetts, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. *See* Cal. Lab. Code §

employment, but also in housing and public accommodations, most of these laws are broader in scope than ENDA would be. Additionally, eight states have executive orders that bar discrimination in public employment based upon sexual orientation.[22] Finally, in addition to state law, over 165 municipalities and counties have enacted anti-discrimination legislation based upon sexual orientation.[23]

C. Snapshots of the Current Landscape

Because religious rights and gay rights separately, let alone collectively, engender such controversy in our society, a brief examination of

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1102.1 (1997); Conn. Gen. Stat. §§ 46a–81c (1997); D.C. Code Ann. § 1-2512 (1997); Haw. Rev. Stat. §§ 368-1, 378-2 (1996); Mass. Ann. Laws ch. 272, § 98 (Law. Co-op. 1996); Minn. Stat. §§ 363.03, 363.12 (1996); N.H. Rev. Stat. Ann. §§ 354-A:7, :8 (1998); N.J. Rev. Stat. §§ 10:2-1, :5-4, :5-12 (1996); R.I. Gen. Laws §§ 28-5-2, 28-5-7 (1996); Vt. Stat. Ann. tit. 3, § 495 (1996); Wis. Stat. § 111.36 (1996). "The State of Maine had a law on the books prohibiting discrimination based on sexual orientation; however, the law was overturned by the voters of Maine in a statewide referendum. See Me. Rev. Stat. Ann. tit. 5, §§ 4552, 4553 (West 1997) (repealed 1998)." Barnard & Downing, *supra* note 15, at 557 n.5. *See also* Carey Goldberg, *Maine Voters Repeal a Law on Gay Rights*, N.Y. TIMES, Feb. 12, 1998, at A1 (reporting voter repeal of Maine law that banned discrimination on the basis of sexual orientation in housing, employment, credit, and places of public accommodation).

22. These states include: Colorado, Louisiana, Maryland, New Mexico, New York, Ohio, Pennsylvania, and Washington. *See, e.g.*, Exec. Order No. 90-13-98 (Colo. 1990); Exec. Order No. Ewe 92-7 (La. 1992) (expired 1996); Exec. Order No. 01.01.1993.16 (Md. 1993); Exec. Order No. 85-15 (N.M. 1985); Exec. Order No. 28.1 (N.Y. 1993); Exec. Order No. 83-64 (Ohio 1983); Exec. Order No. 1988-1 (Pa. 1988); Exec. Order No. 85-09 (Wash. 1985). *See* Barnard & Downing, *supra* note 15, at 558 n.6.

23. Among the cities having such ordinances are some of the larger cities in the United States, including: New York, Los Angeles, Chicago, Houston, Philadelphia, Detroit, Dallas, San Diego, San Francisco, Atlanta, Boston, Phoenix, Denver, Baltimore, Minneapolis, St. Paul, St. Louis, Kansas City, Portland, Pittsburgh, Milwaukee, San Jose, Cleveland, and Columbus (Ohio). See Phoenix, Ariz., Ordinance G-3558 (July 8, 1992); L.A., Cal., Mun. Code ch. IV, art. 12 (1979); San Diego, Cal., Ordinance 0-17453 (Apr. 16, 1990); S.F., Cal., Admin. Code art. 33, § 3301 et seq. (1987); San Jose, Cal., Affirmative Action Guidelines, Resolution 58076 (Feb. 5, 1985); Denver, Colo., City Code § 28-91 et seq. (1990); Atlanta, Ga., City Charter, 1973 Ga. Laws, pt. 2188 (1986); Chicago, Ill., Mun. Code ch. 199 et seq. (1988); Baltimore, Md., City Code art. 4, §§ 9(16), 12(8) (1988); Boston, Mass., Code tit. 12, ch. 40 (1984); Minneapolis, Minn., Code tit. 7, chs. 139, 141 (1975); St. Paul, Minn., Legis. Code ch. 183 (1990); St. Louis, Mo., Ordinance 62710 (Oct. 6, 1992); N.Y., N.Y., Admin. Code tit. 8 (1993); Cleveland, Ohio, Ordinance 77-94 (Mar. 23, 1994); Columbus, Ohio, City Code ch. 2325 (1984); Portland, Or., Resolution 31510 (1974); Phila., Pa., Fair Practices Ordinance ch. 9-1100 (1982); Pittsburgh, Pa., Code tit. 6, ch. 651, art. V (1990); Dallas, Tex., Ordinance 22318 (Jan. 1995) (amending Dallas City Code ch. 34, art. V, §§ 34-35); Milwaukee, Wis., Discrimination Ordinance ch. 109-15 (Dec. 22, 1987). Such laws, however, are not just on the books of large cities. Indeed, in Ohio alone, the small towns of Athens, Cleveland Heights, Lakewood, North Olmsted, Oberlin, Westlake, and Yellow Springs have such laws on the books. See Cleveland Heights, Ohio, Ordinance 77-94 (Mar. 23, 1994); Yellow Springs, Ohio, Town Charter § 29 (Nov. 1979); North Olmstead, Ohio, Ordinance 96-154. Moreover, small cities, such as Youngstown, Ohio; Toledo, Ohio; and Harrisburg, Pennsylvania also have such laws on the books.

Barnard & Downing, *supra* note 15, at 558 n.7.

the legal framework that supports these respective rights is insufficient to understand current American temperament. Therefore, the following section provides a cursory glimpse of the current "culture-scape" in regard to these two issues.

1. State of the secular and religious climate

Because American society aspires to be a democratic *and* pluralistic society, it may be fairly characterized as a healthily schizophrenic society. Americans cling to their secular pursuits, which have undisputedly spurred tremendous legal, scientific, and technological innovations.[24] Secularism, like religious factions, enjoys a non-cohesive variety of adherents: atheists, humanists, materialists, etc., to name just a few. Given this affinity for secular pursuits, it is not surprising that virtually all sociologists have noted that secularism's influence, for decades or perhaps centuries, has been on the rise in Western culture.[25]

Yet, despite secularism's increasing role in modern society, religious discussion in the American public sphere has, if anything, become less taboo and more avant-garde recently.[26] The two candidates in the 2000 presidential election provide an example of this trend on a national scale. Republican candidate George W. Bush proudly shared his Born Again Christian insights with the electorate, and stated that Jesus was his favorite philosopher.[27] Bush's opponent, Democratic candidate Al Gore, disclosed that he often approaches problems with the religious frame of reference: "What would Jesus do?"[28]

Additionally, the wake of September 11 may send more than "shock" waves of people to the nation's churches, mosques, and synagogues. Some sociologists, in fact, favorably compare the current state of affairs to times of past Great Awakenings.[29] Pollsters also claim that spiritual momentum, "spurred by Americans searching for deeper meaning amid material excess[,]" continues to snowball.[30] In any event, one thing is

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24. *See, e.g.*, Wang Gungwu, *Limits of Secularism*, THE STRAITS TIMES, Nov. 25, 2001, at 35.

25. *See id.*

26. *See, e.g.*, Kent Greenawalt, *Religion and American Political Judgments*, 36 WAKE FOREST L. REV. 401, 402 (2001).

27. *See* Hanna Rosin, *Bush's 'Christ Moment' Is Put to Political Test by Christians; Act of Faith or Partisan Ploy, It Draws Faithful's Attention*, WASH. POST, Dec. 16, 1999, at A14.

28. *See* Richard Perez-Petildna, *Lieberman Seeks Greater Role for Religion in Public Life*, N.Y. TIMES, Aug. 28, 2000, at A14.

29. *See* Jenn Burleson, *Will Terrorist Attacks Bring True Revival*, ROANOKE TIMES AND WORLD NEWS, Oct. 8, 2001, at C1.

30. Rebecca Goldsmith, *How Long Will the Candles Burn?*, NEWHOUSE NEWS SERVICE, Sept. 24, 2001. Approximately 95% of all Americans profess a belief in God (citing consistent Gallup poll findings even prior to the September 11 attacks). *See, e.g.*, George Gallup, Jr., *Religion*

clear: American society may not be easily reduced to the polar opposites of secularism and religion. Rather, Americans tend to fall upon a continuum between these two ideologies, and this, in turn, tends to create a healthily schizophrenic society.

2. Glimpse of the gay equality climate

A glimpse of the diverse culture-scape is naturally helpful to provide some context to America's sexual orientation anti-discrimination laws. But specific inquiry into the legal landscape is required. Currently, gay equality jurisprudence in American law is incoherent. Although an increasing number of states and municipalities[31] prohibit the use of a person's sexual orientation as a basis of discrimination,[32] many states, firmly based in the Supreme Court's *Bowers v. Hardwick*[33] holding that upheld the constitutionality of sodomy statutes, still maintain the traditional proscriptions of homosexual conduct. This line of gay jurisprudence provides a sharp contrast with popular culture where critically acclaimed television programs, such as *The Ellen Show* and *Will and Grace*, feature openly gay protagonists.[34]

Moreover, for courts to add another layer of legal analysis, particularly First Amendment religious rights analysis, to this mixed cultural landscape and increasingly complex scheme of gay rights jurisprudence creates an exceptionally complex quagmire through which public employers must navigate. Ultimately, the divisive force of these two stances can gnaw not only at society in general but also splinter specific institutions. For example, even the ACLU has experienced how divisive these forces can be. In the gay rights versus religious rights landmark case of *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*,[35] the national ACLU affiliate, from an anti-discrimination perspective, filed an amicus brief on behalf of the gay students group. The local D.C. chapter of the ACLU, on the other hand, filed an amicus emphasizing the Catholic university's First Amendment freedom to express religious values.[36] Cases such as *Georgetown* set up a

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in America: Will the Vitality of Churches Be the Surprise of the Next Century?, THE PUBLIC PERSPECTIVE, Oct.–Nov. 1995, at 1–8.

31. *See infra* Part II.C.1.

32. *See* Walter J. Walsh, *The Fearful Symmetry of Gay Rights, Religious Freedom, and Racial Equality*, 40 HOW. L.J. 513, 529 (1997).

33. 478 U.S. 186 (1986).

34. *See The Rosie O'Donnell Show* (syndicated television broadcast, Dec. 6, 2001) (featuring Phil Donahue, a noted day-time television pioneer, discussing how far gays have come in gaining social acceptance).

35. 536 A.2d 1 (D.C. 1987) (en banc).

36. *See* Walsh, *supra* note 32, at 516.

classic constitutional collision: under the First Amendment's free exercise clause, the religious group claims the liberty to exclude and express its disapproval of another group; while under the Fourteenth Amendment's equal protection clause, the excluded, gay rights group clamors for equal treatment.[37] Cases that pit these two rights against one another certainly guarantee that "discrimination in the workplace on the basis of sexual orientation could become one of the hottest topics in the field of employment law in the next five to ten years."[38]

3. The advent of gay sensitivity training in the workplace

As early as 1992, the U.S. Census Bureau revealed that at least 1.5 million households in America had self-identified their homes as homosexual domestic partnerships.[39] Because the law could offer only limited equality to America's increasingly diverse workforce, many gay rights advocates sounded a clarion call to educate rather than legislate.[40] Enter gay sensitivity training. By the mid-1990s, advocates, proclaiming that the business community could affirmatively combat homophobia and heterosexism,[41] and that the gay community need no longer tolerate the aggregate losses incurred by sexual orientation discrimination, began educating employers and employees about sexual orientation issues.[42] Specifically, advocates reasonably convinced employers that gays are likely to be less productive employees where they (1) expend too much unproductive energy to "stay in the closet"; (2) experience a lack of job satisfaction in an environment of fear and mistrust; and (3) experience undue stress in an implicitly heterosexist environment.[43]

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37. *See* William N. Eskeridge, Jr., *Symposium: Group Conflict and the Constitution: Race, Sexuality, and Religion: A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2415 (1997).

38. Barnard & Downing, *supra* note 15, 576.

39. *See* Susan Spielman and Liz Winfield, *Making Sexual Orientation Part of Diversity*, 49 TRAINING AND DEVELOPMENT 50 (1995).

40. *See* BRIAN MCNAUGHT, GAY ISSUES IN THE WORKPLACE xiii (1993) (discussing where prominently representative companies such as AT&T, Bell Communications Research, Lotus, Levi-Straus, and MCA took such measures against heterosexism and homophobia in the workplace).

41. Definitions of heterosexism vary. Some advocates describe it as the assumption that everyone is or ought to be heterosexual. *See* MCNAUGHT, *supra* note 40, at 54; *see also* Spielman & Winfield, *supra* note 39. Others align it more closely with invidious racism when they define it as "policies and practices which elevate heterosexuality and subordinate homosexuality." *See* Richard Hunt, *Have Homosexual Rights in the Workplace Gone Too Far?*, *at* www.antipas.org/news/world/homos.html (Nov. 7, 2001).

42. *See generally* MCNAUGHT, *supra* note 40.

43. *See* MCNAUGHT, *supra* note 40, at 1–11; *see also* Spielman & Winfield, *supra* note 39.

4. The content of gay sensitivity training

Most gay-rights advocates can agree on the following core content: (1) a gay presenter is preferable to a heterosexual presenter because he or she can convey that homosexuals are normal and competent; (2) human resources and management *must* support the training; (3) statistics and studies should be used to persuade trainees; and (4) attendance should probably be mandatory to ensure that attending gays will not be harassed or stigmatized and to ensure that those who have objecting personal beliefs will have to at least listen.[44] Some seminars particularly address the double standards that heterosexuals place upon gays in the workplace.[45] The *Gays and Lesbians in the Workplace* seminar, for example, informs employees that heterosexual privileges should apply equally to gays, including: (1) the right to marry; (2) the right to kiss affectionately on the street; (3) the right to children without any questions; (4) the right to custody of children if a partner dies; (5) the right to be sexual with your partner without breaking the law.[46]

Of course, the gay sensitivity approach is not without its detractors. Newspaper columns and editorials reveal that some workers are not happy with this educational approach. For instance, one person lauded the actions of fifty Idaho National Engineering and Environmental Laboratory workers who recently walked out on a homosexual diversity speaker.[47] Recently, a journalist labeled this educational approach as "sinister" when it is sanctioned by the state (for example, where Maoist China employed coercion, deprivation, and torture to convert its citizens to Communism in its cultural revolution camps).[48] According to this writer, American sensitivity trainers, fortunately, have not yet had these sinister means available to them.[49]

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44. *See* Spielman & Winfield, *supra* note 39.

45. *See Cyberfeds, Employees Challenge Sexual Orientation Training*, *at* www.feds.com/nll_lib/fea/fea0208.htm#article16 (last visited Mar. 5, 2002).

46. *See ACLJ Files Suit Against Minnesota Department Corrections*, *at* www.aclj.org/news/NR_980401.asp (Apr. 1, 1998). The ACLJ adds another factor: the right to be offended when heterosexuals discuss weddings or engagements from their perspective. *See id.*

47. *See* Mary Ann Stager, Editorial, *Insensitivity Just Another Label*, IDAHO FALLS POST REG., June 8, 2000, at A8.

48. *See* Charles Krauthammer, Editorial, *The 'How-To' Society*, WASH. POST, Apr. 2, 1993, at A25. Krauthammer recalled how about "[f]ive years ago, a religious student at the University of Michigan expressed the view that homosexuality is immoral. He was made to recant and ordered a dose of sensitivity training. This will make him broad-minded." *Id.*

49. *See id.*

III. A REVEALING TIP OF THE ICEBERG: *ALTMAN*, THE EIGHTH CIRCUIT'S GAY SENSITIVITY TRAINING CASE HIGHLIGHTS TENSIONS IN THE PUBLIC WORKPLACE

By the late 1990s, the gay sensitivity training movement no longer remained in the private employment workplace. This educational movement also grew within the public employment sphere. Such a development, on its face, appears consistent with the growth of state sexual orientation anti-discrimination laws. Therefore, it is not surprising that Minnesota, a state which passed such anti-discrimination legislation,[50] provides the setting for an exemplary case which exposes the contemporary public workplace's struggle to effectively placate the tension between religious free exercise and freedom from sexual orientation discrimination.

A. Events Leading up to the Lawsuit

In light of Minnesota's designation of a "Gay, Lesbian, Bisexual, and Transgender Pride Month,"[51] a training coordinator with the Minnesota Department of Corrections facility in Shakopee ("MCFS") persuaded the facility warden, in mid-1997, to include a program dealing with issues of gays and lesbians in the workplace at MCFS's next regularly scheduled training session.[52] Thomas Altman, an employee of MCSF, "sent [the warden] an e-mail objecting to the mandatory nature of this program and protest[ed] that it would 'raise deviant sexual behavior for staff to a level of acceptance and respectability.'"[53]

The warden, faced with Altman's objection and rumors that other staff members objected, issued a memo explaining that this "program was part of 'the facility's strong commitment to create a work environment where people are treated respectfully, regardless of their individual differences.'"[54] The warden also countered the implication that the training was designed to tell the staff what their personal beliefs and attitudes should be.[55] Therefore, attendance was *mandatory*.[56]

Prior to the sensitivity training, Altman and other objecting staff members reviewed the training material and concluded, according to the

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50. *See* MINN. STAT. §§ 363.03, 363.12 (1996).

51. *See ACLJ Files Suit Against Minnesota Department of Corrections*, *at* www.aclj.org/news /NR_980401.asp (Apr. 1, 1998).

52. *See* Altman v. Minn. Dep't of Corrs., 251 F.3d 1199, 1201 (8th Cir. 2001).

53. *Id.* at 1201.

54. *Id.*

55. *See supra* Part II.A (discussing how the First Amendment's free exercise clause absolutely prohibits the government's attempt to control belief).

56. *See Altman*, 251 F.3d at 1201.

wording of their filed complaint, that the training would be "state-sponsored indoctrination designed to sanction, condone, promote, and otherwise approve behavior and a style of life [they believe to be] immoral, sinful, perverse, and contrary to the teachings of the Bible."[57]

Immediately prior to the training, Altman and two other co-workers met at Altman's home and decided to take their Bibles with them to the mandatory training as a silent protest and as a support for the discomfort the materials caused them because of their religious beliefs.[58] During the training, Altman and his co-workers "read their Bibles, copied scripture, and participated to a limited extent. They did not disrupt the trainers' presentation."[59] Many of Altman's supervisors attended the meeting, and none of them complained about his behavior or the behavior of his co-workers, "or told them to stop reading their Bibles."[60]

At the end of the training session, two trainers complained to MCFS's affirmative action officer about Altman's and the others' behavior.[61] Based on their conduct at the training session, MCFS issued Altman and his fellow co-workers formal reprimands.[62] These reprimands made Altman and the others ineligible for promotion for two years.[63] This was Altman's first negative job performance review.[64]

B. The Tension Spurs a Lawsuit to the Eighth Circuit

This Comment only provides a cursory description of how the Eighth Circuit handled this case because, from this Comment's perspective, it is the underlying facts and circumstances that gave rise to the *Altman* case that are of greater significance than the actual analysis and outcome of this one case itself.[65]

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57. *Silent Protest of Training Session Was Protected Nonverbal Speech*, NAT'L PUB. EMP. REP., July 5, 2001.

58. *See* Altman v. Minn. Dep't of Corrs., 1999 U.S. Dist. LEXIS 14897, at *6 (D. Minn. Aug. 9, 1999).

59. *Altman*, 251 F.3d at 1201.

60. *Id.*

61. *See Altman*, 1999 U.S. Dist. LEXIS 14897, at *7. Specifically, the reprimands were issued for violating DOC Policies 2-203.7B and 2-203.7C, which respectively provide that "[e]mployees shall conduct themselves both on and off the job in a manner that will not bring discredit or criticism to the Department"; and "[e]mployees shall not exhibit behavior that demonstrates prejudice or which has the effect of holding any person, group or organization up to ridicule or contempt." *Id.* at *7–*8.

62. *See Altman*, 251 F.3d at 1201–02.

63. *See id.* at 1202.

64. *See Altman*, 1999 U.S. Dist. LEXIS 14897, at *8.

65. Because more cases like *Altman* are likely to arise (and not just in the public sector), practitioners and other interested parties are encouraged to analyze the Eighth Circuit's handling of this case. *See, e.g.*, Simon J. Nadel, *Employment Discrimination—Religion: Religion and Sexual Orientation at Work May Produce Combustible Combination*, 68 U.S.L.WEEK 2163 (1999); Jack S.

After the MCFS took its adverse employment action against Thomas Altman and his co-workers, Altman and the others, represented by the American Center for Legal Justice ("ACLJ"),[66] filed an action against the Minnesota Department of Corrections and against their supervisors in their official capacities on several grounds, many of which are beyond the scope of this Comment.[67] With regard to the pertinent issue of free exercise, the district court, relying upon reasoning of *Employment Division Department of Human Resources of Oregon v. Smith*[68] and the *Pickering*[69] balancing test, granted summary judgment in favor of Altman and the others. Factually, the court was troubled by the notion that, prior to and after the gay sensitivity training session, inattentiveness at MCFS training sessions had never been disciplined.[70] Other employees, for example, at this or other training sessions had read magazines, fallen asleep, worked on unrelated paperwork, crocheted, and even left early.[71] MCFS never disciplined these inattentive employees; however, MCFS did discipline Altman and the others for inattentively but silently reading their Bibles.[72] While the district court recognized that MCFS "has a strong interest in preventing harassment based upon sexual orientation,"[73] the court emphatically noted that MCFS failed to show how Altman's and the others' Bible reading directly or even indirectly contributed to or fostered any such harassment; therefore, the court concluded that "judgment in favor of [Altman] is warranted on the issue of Free Exercise."[74]

Vaitayanonta, Note, *In State Legislatures We Trust?: The Compelling Interest Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 COLUM. L. REV. 886, 887 (2001).

66. Christian broadcaster, Pat Robertson, founded the ACLJ. *See* Debra Baker, *Acting on One's Beliefs: Clash Between Gay Rights and Religious Freedom Spills Over Into Workplace*, 86 A.B.A. J. 18 (Jan. 2000). Arguably, the ACLJ is to the "Religious Right" what the ACLU is to the "Liberal Left."

67. At the district court level, Altman and his co-workers submitted their complaint claiming that (i) Defendants had violated their right to free speech as guaranteed by the First and Fourteenth Amendments and as protected by 42 U.S.C. § 1983; (ii) Defendants had violated various rights as guaranteed by the Minnesota constitution; and (iii) Defendants' reprimand and failure to promote constituted an unfair employment practice in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, among other claims. *See Altman*, 1999 U.S. Dist. LEXIS 14897, at *1–*2.

68. 494 U.S. 872 (1990).

69. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

70. *See Altman*, 1999 U.S. Dist. LEXIS 14897, at *17–*20.

71. *See id.* at *17–*18.

72. *See id.*

73. *Id.* at *19.

74. *Id.* at *19–*20. Because the Eighth Circuit could identify no significant burden placed on Altman's and the others' Bible reading activity, the circuit court reversed the district court's grant of summary judgment on the free exercise issue. *See* Altman v. Minn. Dep't of Corrs., 251 F.3d 1199, 1203-05 (8th Cir. 2001). Specifically, the court stated that "the only burden placed on Appellants was a requirement they attend a seventy-five-minute training program at which they were exposed to widely-accepted views that they oppose on faith-based principles. This is not, in our view, a substan-

IV. WHY EQUAL PROTECTION HOLDS LITTLE HOPE OF RESOLVING THIS DEBATE

As mentioned above,[75] because the First Amendment's free exercise clause has enjoyed over 200 years of legal interpretation and analysis and because all state constitutions provide for the free exercise of religion or freedom of conscience,[76] this Comment will focus on the newer or lesser right's—freedom from sexual orientation-based discrimination—plight in American society at large as well as the public employment sector in particular. Unfortunately, in an attempt to elevate their claims to constitutional par, gay rights advocates misplace their reliance upon the equal protection clause. To achieve their ultimate goals, such advocates should turn toward, rather than away from, the American religious experience—culturally and legally.

Many, if not most, people recognize that gays face serious obstacles when they seek workplace, housing, marital, adoption, armed forces, and privacy rights because many current laws and policies classify and negatively impact people according to their gay sexual orientation. Gay rights advocates, arguing that such classifications trigger equal protection concerns, have sought increased judicial scrutiny for decades. However, focusing so much energy in the equal protection arena is unlikely to grant these advocates the recognition and rights they seek. Equal protection jurisprudence is inconsistent, disorganized, and appears closed—especially because courts, since the 1970s, have gotten out of the business of creating new suspect classes.

A. A Brief Review of Equal Protection's Three-Tiered Framework

The Fourteenth Amendment's equal protection clause commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[77] The Fifth Amendment's due process clause similarly applies to the federal government, which also may not classify

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tial burden on their free exercise of religion." *Id.* at 1204. Although not pertinent to this Comment, it is worthy to note, however, that the Eight Circuit reversed the district court's dismissal of Altman's First Amendment free speech claims. *See id.* at 1202–03. Therefore, reversal on the free exercise issue did not prove fatal to Altman and his fellow Bible readers' claims. Of course, as stated at the outset of Part III, this Comment's purpose in exploring the *Altman* case is not to prove its outcome or underlying analysis, but rather to expose the growing tension between advancing sexual orientation rights and religious rights in the public workplace. *See infra* note 38 and accompanying text.

75. *See supra* Parts I & II.A.

76. *See* Vaitayanonta, *supra* note 65, at 902 n.54.

77. U.S. CONST. amend. XIV.

"individuals in a way which would violate the equal protection clause."[78] In other words, courts, depending on what group is affected, apply different standards when examining group-classifying laws.

1. The rational relationship or rational basis test

This test provides the default or general rule in equal protection analysis where legislation is presumed valid and "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[79] This lowest tier "is designed to allow even unwise legislation to pass muster easily, because the democratic process, rather than the courts, is supposed to be the usual means for repealing even foolish legislation."[80] Therefore, "[m]ost laws—including laws that classify people according to sexual orientation, age, or wealth—will be upheld."[81]

2. The heightened or intermediate scrutiny test

Under this standard, courts "will not uphold a [legislative] classification unless they find that the classification has a 'substantial relationship' to an 'important' government interest."[82] Legislative classifications, based on gender, merit this quasi-suspect classification because such classifications "very likely reflect outmoded notions of the relative capabilities of men and women."[83] Legislative classifications based on illegitimacy also merit this mid-tiered scrutiny because "illegitimacy is beyond the individual's control and 'bears no relation to the individual's ability to participate in and contribute to society.'"[84]

3. The strict scrutiny test

Courts apply this test when the government classifies by race, national origin, or alienage.[85] Such laws will be sustained "only if they are [narrowly] tailored to serve a compelling state interest."[86] Courts use this stricter test when examining such classifications because these minorities lack the political power necessary to protect their rights in the democratic

78. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 206 (3d ed. 1999).

79. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

80. EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS BASED EQUAL PROTECTION 20 (1999).

81. *Id.* at 22.

82. 3 ROTUNDA & NOWAK, *supra* note 78, at 219.

83. *Cleburne*, 473 U.S. at 441.

84. *Id.* (quoting Matthews v. Lucas, 427 U.S. 495, 505 (1976)).

85. *See* 3 ROTUNDA & NOWAK, *supra* note 78, at 218.

86. *Cleburne*, 473 U.S. at 440.

process.[87] Strict scrutiny is also applied when examining race, national origin and alienage-based classifications because these classifications "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."[88]

B. Applying the Three-Tiered Framework to Gays

Although gays assert several reasonable arguments why they meet the *Carolene Products*[89] criteria, to argue further upon this constitutional thread is likely futile for several reasons and should therefore be abandoned for other theories.[90] Clearly, many gay rights advocates desire more than rational-basis scrutiny, which has been described as "minimal scrutiny in theory and virtually none in fact,"[91] because "[i]f the Supreme Court were to decide that gays . . . are a suspect class and direct all courts to apply strict scrutiny to laws that classify according to sexual orientation, virtually all these laws would likely be struck down."[92] However, courts, including and especially the Supreme Court, have been reluctant to find that gays are a suspect class and probably never will. Because gays have difficulty qualifying for heightened status under the factors outlined in *Carolene Products*, gays will probably not achieve their equal treatment goals through an equal protection approach.

C. The Carolene Products Qualifying Criteria

The gist of *Carolene Products*' famous footnote 4[93] provides that certain "discrete and insular minorities" cannot protect themselves from the pluralistic majority's unfavorable treatment; "[t]herefore the [courts] must take special care to protect these minorities" from the politically powerful majority's prejudices.[94] One appellate case in particular provides, arguably, the best precedential language for finding that gays meet *Carolene Products* strict scrutiny criteria.

In *Gay Rights Coalition v. Georgetown University*,[95] the District of Columbia Court of Appeals held that Catholic "Georgetown University

87. *See* GERSTMANN, *supra* note 80, at 21.

88. *Cleburne*, 473 U.S. at 440.

89. United States v. Carolene Products, 304 U.S. 144 (1938). *See infra* Part IV.B.1.

90. *See infra* Part VI for one such alternative theory or proposal.

91. Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

92. GERSTMANN, *supra* note 80, at 23.

93. *See Carolene Products*, 304 U.S. at 153 n.4.

94. GERSTMANN, *supra* note 80, at 26.

95. 536 A.2d 1 (D.C. Cir. 1987). *See supra* notes 35–38 and accompanying text for additional information regarding the controversy that this case spurred in Washington, D.C.

could not claim a *religious* freedom exemption from a Washington, D.C.," sexual orientation anti-discrimination law.[96] As part of her rationale for concurring, Judge Mack stated that "sexual orientation appears to possess most or all of the characteristics that have persuaded the Supreme Court to apply strict or heightened constitutional scrutiny to legislative classifications under the Equal Protection Clause."[97] Specifically, the *Georgetown* court determined (1) that there is a long and unfortunate history of discrimination based on sexual orientation; (2) that available evidence suggests that sexual orientation is determined by causes not within the individual's control and not generally subject to change; and (3) that due to continuing legal and social stigma, gay persons constitute discrete and insular minorities whose interests are unprotected by political processes.[98] In short, therefore, this appellate court was persuaded that *Carolene Products*' ingredients were present in this sexual orientation trumping religious free exercise case,[99] namely: (1) a history of discrimination, (2) immutability of characteristics, and (3) political powerlessness. Another appellate court has yet, however, to be similarly persuaded, and this situation will not likely change because equal protection proponents and opponents make equally convincing arguments that each of these three ingredients apply (or do not apply) in the sexual orientation context.

1. History of discrimination

Even most opponents of granting suspect class status to gays concede that gays have experienced discrimination in American society. The only courts that have addressed this issue squarely have ruled that even though gays are not a suspect class, they "do agree that homosexuals have suffered a history of discrimination."[100]

Opponents of this rationale, however, do take issue with the degree of discrimination, because relative to the black slavery experience, which gave rise to equal protection jurisprudence, gay discrimination has not been nearly as pervasive and invidious. Further, in more recent history, society has increasingly been willing to stigmatize those who discriminate against gays rather than stigmatize the gay class itself.[101]

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96. GERSTMANN, *supra* note 80, at 5–6 (emphasis added).

97. *Georgetown*, 536 A.2d at 36.

98. *See* Walter J. Walsh, *The Fearful Symmetry of Gay Rights, Religious Freedom, and Racial Equality*, 40 HOW. L.J. 513, 522–523 (1997) (citing *Georgetown* 536 A.2d at 31–39).

99. *See supra* Part II.C.2.

100. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990).

101. *See supra* notes 20–23, 46 and accompanying text.

2. Immutability

Gay rights advocates argue that sexual orientation is immutable because it is a genetically influenced characteristic—not a choice. Opponents, on the other hand, respond that most laws (e.g., anti-sodomy statutes, etc.) do not single out gays because of their orientation, but for their voluntary behavior. As the Sixth Circuit put it: "Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation but rather by their conduct which identifies them as homosexual . . . ."[102]

As mentioned above, gay rights proponents do set forth reasonably persuasive arguments. Evidence, including scientific evidence, strongly suggests that "sexual identity is immutable and almost certainly genetically influenced."[103] In the alternative, even if sexual orientation is not predominantly genetic, proponents undermine whether immutability should be a qualifying characteristic when "supposedly immutable characteristics . . . are as much creations of culture as of genetics. Racism, for example, is a consequence not of differences in human pigmentation, but of how those differences are culturally perceived."[104] In fact, many "African-Americans" of mixed ancestry must, at some point in their lives, "come-out"—they must affirmatively choose whether they self-identify themselves as white or black. Therefore, like many gays, they are one or the other because of declaration, not immutability.[105]

Opponents, at least based on court results, counter with more persuasive arguments. Opponents on the immutability issue argue that gays are singled out because they share a common behavior rather than a common orientation. One commentator on this issue has stated that

> [i]f the group seeking . . . protection is defined by voluntary behavior that flouts majoritarian notions of morality, then it seems reasonable to ask that group to stop engaging in that behavior. Society singles out all sorts of behavior-based groups for negative treatment—adulterers, bigamists, and people who use prostitutes, among many other groups. Yet no one would argue that such groups are suspect classes.[106]

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102. Equal. Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2519 (1996).

103. Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 359 (1999).

104. *See id.* at 359 n.1003.

105. *See* JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY 28 (1995).

106. GERSTMANN, *supra* note 80, at 76.

Most courts have accepted this argument, especially in light of *Bowers v. Hardwick*[107] and its progeny.[108] Even courts that have not accepted this argument have figuratively thrown their hands up and determined that this is not a legally amenable issue, but an issue of science, philosophy, sociology, and so forth.[109] Therefore, within the judicial sphere, the immutability issue does hold out much promise for gay rights advocates despite their reasonably persuasive arguments.

3. Political powerlessness

Justice Scalia's dissent in *Romer v. Evans*[110] sums up one camp of pervasive judicial thought on this equal-protection-qualifying characteristic:

> [B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers . . . . Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.[111]

In *High Tech Gays v. Defense Industrial Security Clearance Office*, even the "powerless-friendly" Ninth Circuit conceded that gays are too politically powerful to be a suspect class when that court recognized that "*legislatures* have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not

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107. 478 U.S. 186 (1986).

108. *See, e.g.*, GERSTMANN, *supra* note 80, at 67–75 (outlining cases subsequent to the influential *Bowers'* decision).

109. *See id.* at 66–67.

110. 517 U.S. 620 (1996).

111. *Romer*, 517 U.S. at 645–46 (1996). Of course, gay rights advocates often point to *Romer v. Evans* as a victory case for their efforts because Colorado's controversial constitutional amendment 2, which thwarted the state's granting of "special rights" to the gay community, was struck down on equal protection grounds. However, this victory may be fairly characterized as a small or hollow one at best because the Supreme Court's majority, employing silently-heightened or "second-order" rational-basis review, did not elevate the gay class to a higher level of scrutiny. Therefore, in the long run,

> *Romer* sends the signal to lower-court judges that they may have a freer hand to strike down antigay laws that happen to seem unfair to them by silently raising the level of scrutiny applied to those laws. This is not constitutional protection—it leaves gays and lesbians at the whim of the judiciary . . . . [T]hey can only hope that the particular judges who hear their cases happen to consider that treatment unfair. Most often, they have not.

GERSTMANN, *supra* note 80, at 137.

without political power; they have the ability to and do 'attract the attention of lawmakers.'"[112]

Again, on the other side of this argument, proponents of gay rights under the equal protection penumbra have convincing arguments. These advocates assert, perhaps rightfully, that courts have engaged in using double standards against gays. Particularly noteworthy is the Supreme Court's "suspect classification" versus "suspect class" standard.[113]

Whites and males, who do not belong to any suspect class, benefit from this double standard. For example, in *Regents of the University of California v. Bakke*,[114] Alan Bakke, a student seeking admissions to the Medical School of the University of California at Davis, claimed that he was disadvantaged because he was white. Notably, the Supreme Court did not ask whether Bakke belonged to a politically powerless "class." Rather the Court switched gears by inquiring whether Bakke had been subjected to state policies and laws based on the forbidden "classification" of race. Therefore, the Supreme Court extended strict scrutiny review to Bakke's situation even though Bakke was a member of the politically powerful non-suspect white class.[115] Gay rights advocates logically posit, therefore, that if strict scrutiny can apply to privileged white males, why should courts ask gays to prove that they are powerless victims?

V. TOWARD A RESOLUTION

Until this point, this Comment has highlighted (1) how the gay rights sensitivity training approach, a recent non-legal or educational phenomenon in the public workplace and (2) how the equal protection framework, a more established legal approach, have attempted to provide the treatment that gays seek. In light of what the gay community really desires, neither will likely prove successful. When the state mandates compulsory attendance to a training workshop that, by its very nature, presents only one side of this morally controversial issue, and when the state mandates,

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112. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990) (emphasis added). Many legal scholars have also advanced this point. Representative of such scholars, Professor Richard Duncan has opined that unlike "racial and ethnic minorities and other groups protected by anti-discrimination laws . . . homosexuals have not been economically impoverished by pervasive and invidious discrimination." Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 444 (1994).

113. *See, e.g.*, GERSTMANN, *supra* note 80, at 84–90.

114. 438 U.S. 265 (1978).

115. Whites are not the only beneficiaries of this double standard. The Supreme Court has also used "classification" rather than "class" to apply heightened review to males even though males are not members of a politically powerless class. *See* GERSTMANN, *supra* note 80, at 87–88. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

by judicial edict rather than by representative legislation, that one side of this morally controversial issue shall have its rights elevated, gay rights proponents still lose. Specifically, the following sections highlight this problem and explain: (1) what change(s) gays optimistically seek from the law; (2) how the gay community would more likely achieve these changes if they turn to, rather than away from, religious influence; and (3) why the gay community should rely upon its shared characteristics with religion to develop a principled-basis (rather than state-assisted basis) for potentially changing the culture as well as its laws.

A. Of Culture Shifting

Opponents of gay rights legislation have commented that gay rights advocates seek not a change in the law but a "forced . . . cultural change . . . requiring all of society to give full approval to homosexuality."[116] This may be somewhat extreme, but gay rights advocates would likely agree that "[u]ltimately, lesbians and gay men desire not only legal change, but a change in societal attitudes as well."[117] Few agree, however, on how to effectuate that change.

1. New Zealand's experiment

In the early 1990s, New Zealand enacted massive sexual orientation discrimination reform.[118] New Zealand's parliament not only passed an anti-discrimination law but also repealed its military stance regarding the gays in its armed services, abolished sodomy as a crime, and gave residency status to same-sex partners of New Zealand citizens.[119] Gay rights advocates were chagrined to learn, however, that New Zealand was a progressive society only on paper because "it merely had the formal rules that ought to govern an utopia that includes lesbians and gay[s]."[120] Despite New Zealand's lawmaking, its gay citizens still lived in the shadows of the national culture. Apparently, a streamlined national government that perceives itself as progressive had effected some changes in

116. *Response to the Gay Rights Agenda at* www.capitolresource.org/respon.htm (last visited Nov. 5, 2001).

117. Marc L. Rubinstein, Note, *Gay Rights and Religion: A Doctrinal Approach to the Argument that Anti-Gay-Rights Initiatives Violate the Establishment Clause*, 46 HASTINGS L.J. 1585, 1620 (1995). Gay rights advocates generally argue for the accomplishment of three goals: (i) protection from discrimination, especially in employment, housing, etc.; (ii) freedom from intrusion and harassment, particularly from the hands of the government; and (iii) some degree of recognition of gay relationships. *See* Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 968 (1997).

118. *See* Stoddard, *supra* note 117, at 969.

119. *See id.* at 968–969.

120. *Id.* at 969.

the rules, but the cultural climate was decades behind that of even the United States.[121]

To change a society's values requires more than tinkering with its legal system. It requires a process similar to one experienced during the American Civil Rights era of the late 1950s and early 1960s.[122] When introducing such social legislation, lawmakers have at least five goals. First, under a *lawmaking* paradigm, lawmakers seek (1) to create new rights and remedies for victims and (2) to alter the conduct of the government.[123] Second (especially subsequent to the civil rights movement, which sought to make change in extralegal ways by seeking social change and by seeking to improve the society in fundamental ways),[124] under a *culture shifting* paradigm, lawmakers seek (3) to alter the conduct of citizens and other private entities; (4) to express a new moral ideal or standard; and (5) to change cultural attitudes and patterns.[125]

2. Enhancing the likelihood of transcending lawmaking into a culture shift: Lessons from the civil rights era

When interested parties, such as gay rights advocates, desire to achieve the second-order type of laws—laws which assist in culture shifting—they must consider the source of the new rules. The source of new social rules is critical. Generally speaking, legislative rules rather than judicial rules are more likely to effect cultural change. For example, U.S. citizens in some regions disliked Congress's 1964 civil rights package, but they did not rise in rebellion. If, however, the 1964 Act had issued from the bench of the U.S. Supreme Court, the decision would have been perceived as illegitimate, high-handed, and undemocratic.[126]

That is not to say, however, that the judiciary does not have a crucial role to play in the lawmaking to culture shifting process. In the United States' experience, its high court prepped the national legislature with its landmark *Brown v. Board of Education*[127] case among others. This provided ten years of examination, reflection, and debate, which, in turn,

121. *See id.* at 971–72.

122. *See infra* V.A.2.

123. *See* Stoddard, *supra* note 117, at 972.

124. *See id.* at 973.

125. *See id.* at 972. After passing such social legislation, the affected society may determine whether lawmaking has effected culture shifting when there is a sense of (1) a change that is very broad or profound; (2) public awareness of that change; (3) legitimacy of the change; and (4) overall, continuous enforcement of that change. *See id.* at 978. Again, reflection upon the United States' Civil Rights Act of 1964 serves as an effective model of measuring culture shift.

126. *See id.* at 977.

127. 347 U.S. 483 (1954).

enhanced the legitimacy of the subsequent civil rights product.[128] In short, "[l]awsuits are effective at highlighting problems," but ineffective at long-term resolutions of deep cultural issues because the judiciary is rule focused rather than focused on the culture that sustains the rules.[129]

When it comes to culture shifting, "[p]rocess matters. How a rule comes about may, in the end, be as important as what it says."[130] Therefore, gay rights advocates should focus on legislatures, despite the inherent difficulties in that arduous process, rather than focus intently on the courts. William N. Eskeridge, a leading gay rights advocate, adds that

> gay radicals would be . . . naïve . . . if they believed that gay equality trumps the rights of everybody else. It would be naive, because we are the new "rights group" on the block, *and human beings and their institutions require time and struggle to internalize a new group.*[131]

It must not be overlooked, however, that lawmaking is important even if it only modifies behavior and never accomplishes the cultural shift in attitude. Martin Luther King, Jr. said of the civil rights laws:

> [E]ven though morality may be legislated, behavior can be regulated. And this is very important. . . . It may be true that the law can't make a man love me, but it can keep him from lynching me, and I think that's pretty important also.[132]

Therefore, to achieve any hope of culture shift, gay rights advocates must remove themselves from the equal protection quagmire. A judicial decision, even from the Supreme Court, granting gays the suspect class status that they seek is unlikely to accomplish culture shift. Therefore, the gay community should continue its current state-by-state, municipality-by-municipality approach,[133] because what this approach lacks in national uniformity, it compensates for in regional credibility. Also, the state, as public employer, must get out of the business of *compelling* its employees to attend gay sensitivity seminars. Endorsing one viewpoint over others in this morally controversial area spells increased cultural resentment rather than desired culture shift.

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128. *See* Stoddard, *supra* note 117, at 984.

129. *Id.* at 985–86.

130. *Id.* at 991.

131. Eskeridge, *supra* note 37, at 2473 (emphasis added).

132. Alfred J. Sciarrino, *Civil Rights: Religion in the Public Sphere*, 30 HOW. L.J. 1127, 1133 (quoting J. WASHINGTON, A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 480 (1986)).

133. *See supra* Part II.B.2.

3. Another lesson the gay rights movement should learn from the civil rights era

Pitting a religious defense against civil rights is not new,[134] but *Altman* is among the recent handful of cases to move this debate into the employment arena.[135] Typically, contemporary advocates of gay rights consistently complain about the religious opposition's tactics. The ACLU's director of the National Gay and Lesbian Rights Project, Matthew Coles, opines that "there is a very concerted effort to say religious freedom should give you an out from civil rights law. 'This is the defense du jour.'"[136] Other advocates agree that "religious freedom [is] a smokescreen for discrimination."[137] Some advocates see religion as such a catalyst behind many of the anti-gay-rights initiatives throughout the Union that an establishment clause defense should be mounted. Clearly anti-gay-rights legislation, they say, at the very least entangles the state with religiously motivated organizations seeking to roll back gay rights victories.[138] However, "[w]hile political activity by religious groups today may be perceived as dangerous by some, the lessons of the Civil Rights era [teach otherwise]."[139]

To achieve culture shift, gay rights advocates need to see religious factions within our society not as the enemy but as a potential ally. The United States Supreme Court sagely recognized the deleterious affects of leaving American religion out of society's culture shifting process when Justice Brennan stated that "churches as much as secular bodies and private citizens" have the right to "take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions."[140]

If history teaches anything, it teaches not only that religion as a culturally conservative institution may raise objections to culture shifts such as women advancing into the workplace or interracial marriage[141] but also that, historically, church leaders have been advocates at the forefront of political struggles—especially the culture-shifting struggles—for the abolition of slavery, for the granting of universal suffrage for women, and for passage of comprehensive civil rights reform.[142] Hubert Hum-

134. *See supra* note 2 and accompanying text.

135. *See supra* note 3 and accompanying text.

136. Baker, *supra* note 66, at 18.

137. *Government Supports Gay Protections in Louisville Case*, FEDERAL EEO ADVISOR, Sept. 15, 2000.

138. *See* Rubinstein, *supra* note 117, at 1592.

139. Sciarrino, *supra* note 132, at 1129.

140. McDaniel v. Paty, 435 U.S. 618, 640–641 (1978) (Brennan, J., concurring).

141. *See* Baker, *supra* note 66, at 19.

142. *See* Sciarrino, *supra* note 132, at 1129, 1131.

phrey emphatically declared that the Civil Rights Act of 1964 could not have been passed without the backing it received from the nation's churches,[143] where church leaders aroused the nation's conscience "and religious individuals put their bodies on the line."[144]

B. Reconciliation and Building upon Common Ground

Although, at first glance, religious freedom and sexual orientation freedom tend to collide as bipolar opposites in contemporary American culture, in reality, these two principles share much in common. Connecting religion and sexual orientation may, from a religious perspective, be an act of profanity or sacrilege; however, at a minimum, these two forces are bound by a common history of persecution and prejudice.[145]

1. Similarities between religion and sexual orientation

Justice Scalia's dissent in *Romer*[146] implicitly connects religion and sexual orientation when he refers to the morally controversial *kulturkampf* in which these two forces are engaged.[147] *Kulturkampf* means "culture struggle." The term's popular usage may be traced to German Chancellor Otto von Bismarck's campaign to assimilate or force conformity upon his state's Roman Catholics between 1871 and 1887.[148] A cultural struggle need not involve the state, but when the state foregoes its neutrality, in the long-term, both sides of the struggle lose because state-endorsed coercion rarely achieves cultural shift. Of course, state-sanctioned *kulturkampf* is not foreign to the American experience. Within the area of gay rights, for instance, during the Post-World War II era that culminated in the Stonewall riots of 1969,[149] America engaged in its own *kulturkampf* against gays.[150]

Religion and sexual orientation, however, share more than a common history of state-endorsed persecution.[151] For example, in general terms,

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143. *See* A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 169 (1985).

144. Greenawalt, *supra* note 26, at 401.

145. *See* Eskeridge, *supra* note 37, at 2474.

146. 517 U.S. 620 (1996) (Scalia, J., dissenting).

147. *See id.* at 634. Justice Scalia states: "The Court has mistaken a Kulturkampf for a fit of spite. . . . I vigorously dissent." *Id.*

148. *See* Eskeridge, *supra* note 37, at 2413–14.

149. *See generally* RUTHANN ROBSON, GAY MEN, LESBIANS, AND THE LAW (Martin Duberman ed., 1994).

150. Justice Scalia would probably argue that the state did not improve society's aggregate lot by switching sides in the *Romer* decision.

151. Professor Eskeridge highlights this historical similarity when he scrutinizes gay persecution in light of the United States *kulturkamp* against the Mormons. *See* Eskeridge, *supra* note 37, at 2421–27.

unlike the protected classes of race and gender, neither are superficially discernible.[152] Physical appearance in today's workplace no more reveals a worker's sexual orientation than it reveals a worker's religious affiliation. Moreover, individuals with similar sexuality values, like those who share similar religious sentiments, tend to seek out a larger community with which to associate.[153] Also, religion and sexuality differentiation tends to occur within individuals' thoughts and actions. Religious adherents, for example, form a belief and bond with God and their actions of prayer or service to others conform with this underlying system of thought and emotion. Gays also form within their thoughts a strong emotional or physical connection and seek to interact, even sexually, with that "other."[154] Finally, adherents tend to think of their religion or sexual orientation as a natural "given," while others of another faith or sexual orientation are viewed as having "chosen" (albeit incorrectly) theirs.[155]

Of course, there are tremendous differences between religion and sexual orientation. The "other" in one context is a Supreme Being that relies upon faith to maintain a relationship; whereas, in the sexual orientation context, the "other" is a tangible person. Nevertheless, this and other differences do not overcome the similarities which justify that we treat these two issues, at least in the public sphere, similarly. At a minimum, gays deserve as much freedom from state-endorsed influences that attempt to compel heterosexuality just as much as devout believers deserve freedom from coercive influences of compulsory atheism.

2. A proposal: The state should treat sexual orientation variation similarly to how it treats religious variation

Not only do past achievements of religious-led culture shifts inform the gay community how to implement prospective, *non-coercive* culture shift, the very text of the United States Constitution does also. The inherent tensions within the First Amendment's free exercise clause and establishment clause offer gay rights seekers a means to achieve tolerance of sexual orientation diversity the same way that diversity in religion has achieved social tolerance. The free exercise clause of the First Amendment "prevents the state from censoring deviant religions and . . . pre-

152. *See id.* at 2418.

153. *See id.* at 2419–20.

154. *Id.* at 2417.

155. *Id.* at 2419. Brian McNaught, a nationally distinguished presenter in gay sensitivity training seminars, notably equates employers wrestling with sexual orientation issues to the same struggles that employers face when grappling with religious issues in the workplace. *See* MCNAUGHT, *supra* note 40, at xv.

vents the state from unduly discriminating against religious belief."[156] The establishment clause, on the other hand, prevents the state from imposing its own view of religious orthodoxy upon its citizens. Together, these respective clauses provide that the state must allow normative groups the opportunity to wither or flourish, and the state, unlike Chancellor Bismark's German state, should not become the means for the triumph of one community over all the others.[157] In other words, "[t]hese [First Amendment] principles balance the interests of people of competing, and indeed antithetical, views and thus achieve a kind of *neutrality*"—religious adherents are assured protection, and secularists are assured that the government will not promote religion.[158]

Although it is almost certain that a national amendment for sexual orientation would never pass, perhaps it would be fruitful to address the culture's concerns in this controversial area by approaching legislation in a fashion similar to the Founders' approach to the controversial area of religious belief. Analogizing sexual orientation issues to the free exercise clause, gay rights advocates could freely assert that homosexuality is normal, natural, and moral while traditional sexuality advocates could maintain their view that homosexuality is abnormal, unnatural, and immoral. Both sides are worthy of the respect granted to these antithetical positions[159]—atheists and believers, gays and straights alike. Moreover, analogizing sexual orientation issues to the establishment clause is consistent with the notion that morally controversial issues are not for the government to decide.[160] Neither a judge sitting in Washington, D.C., nor a government bureaucrat working in Minnesota is any more competent to judge religious truth than sexual truth.

Of course, both sides of the sexual orientation issue are likely to resent this approach. Gay rights advocates would probably accept the free exercise approach, but not welcome a disestablishing position because such advocates often want to use the state to teach that opposition to homosexuality is bigotry and the state should inflict penalties upon those who discriminate on its basis.[161] Traditional advocates would resist implementing either clause, particularly the establishment clause because

156. Eskeridge, *supra* note 37, at 2415.

157. *See id.*

158. Michael W. McConnell, *What Would It Mean To Have a "First Amendment" for Sexual Orientation*, *in* SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE 235 (Saul M. Olyan & Martha C. Nussbaum eds., 1998) (emphasis added).

159. *See id.* at 235.

160. *See id.*

161. *See id.* at 235–36.

such advocates want to maintain a certain level of official stigma to discourage homosexual behavior.[162]

Both sides' respective agendas, however, fail to appreciate the "culture-benefiting" aspect of such a constitutional approach. The first clause commits sexual orientation to the private sphere and, therefore, eliminates the need for public agreement: Each side can go its own way.[163] The second clause grants equal access: "allow[ing] the competing groups to participate in the public sphere on equal terms."[164] Government is restrained from expressing a view either way. This approach enhances the likelihood of an enduring culture shift in the workplace and beyond. A government, however, that resorts to championing one side of this issue by proclaiming "Gay, Lesbian, Bisexual, and Transgender Pride Month" and mandating that its public employees be sensitized to this issue sacrifices long-term culture shift at the altar of perceived enlightenment.[165]

VI. CONCLUSION

Controversial issues such as religious freedom and sexual orientation will always be with us, especially in the workplace where we are compelled to interact with one another. Our task, therefore, in a free and pluralistic society, is not to extinguish or unduly limit these core fundamentals. Rather our challenge is to create policy structures that will allow for the individual expression of either without harming the commonwealth or the aggregate whole of society. We have, relative to the rest of the world, achieved this for religion with our Constitutional "first" religious rights. This First Amendment, richly complemented by our heritage of religious jurisprudence and experience, provides a principled basis upon which to do this for other normative communities. By applying the neutrality-based principles of the two religion clauses to sexual orientation, we may reap the benefits that inure to a healthier pluralistic society rather

162. *See id.*

163. *See id.* at 237.

164. *Id.*

165. Some may argue that the contextual difference between religion and sexual orientation limits some of these analogies. For example, the religion clauses at their inception and to this day became effective in a social landscape of multiple religions. Some argue that, the sexual orientation landscape is, on the other hand, bipolar in structure with each side claiming the moral high ground, meaning that one side can only be right to the exclusion of the other; whereas, in the religion context, mutually exclusivity is not such an issue because many believers recognize that other faiths, though "inferior," have some slivers of truth. *See id.* at 256. This argument, however, unduly oversimplifies the cultural context. As outlined above, it is unfair to characterize all of society by its clashing moral extremes. Polling information and common reason inform us that, with regards to issues relating to sexual orientation, Americans are strewn across the continuum of possibilities. Therefore, just as a heterogeneous group of religious adherents benefit from neutrality-based free exercise and establishment protection, so too should adherents to various views of sexual orientation.

than reap the burdens that accompany a pluralistic society that subtly seeks to achieve homogeneity through unprincipled or coercive means.

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